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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 1159

UNITED STATES OF AMERICA,

Respondent,

—against—

CARL J. SIMON, ROBERT H. KAISER and MELVIN S. FISHMAN,

Petitioners.

PETITIONERS' REPLY BRIEF

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I

The Government relies upon *Singer* v. *United States,* 380 U.S. 24, for the proposition that a Federal District Court is powerless to reject even arbitrary refusals by the Government to consent to an accused's waiver of trial by jury. As the Government reads *Singer,* this Court intended only one exception to the prosecutor's right to be arbitrary—the situation in which it appears that a jury would be prejudiced against the accused.

We doubt that by its use of the term "impartial trial" in *Singer,* this Court intended to give such license to the Government in the prosecution of criminal cases. Neither linguistics nor logic supports the narrow interpretation of "impartial" advanced by the Government. The word "impartial" is a synonym for "just" and "just" is prop-

erly and realistically defined in the dictionary as "well-founded". Certainly a trial cannot be "impartial" if the trier of facts does not have the capacity of full understanding of every element and phase of the case.

Nor does logic support limiting the trial judge's discretion to cases involving strong public feelings. The inability of a jury to grasp a difficult and complicated case is certainly no less unfair than a verdict tainted by bias.

The Government attempts to rationalize its insistence upon a jury by speculating in this Court that the prosecutor feared that two different trial judges might be "partial". It is so patently improbable that a prosecutor could reasonably and in good faith impute bias in the same case to *two* judges, each distinguished in his own right by service at bench and bar, that speculation about the prosecutor's reasons obviously must have a firmer base than this. The rationalization which the Government now proffers hardly pays lip service to the observation in *Singer* that ". . . the government attorney in a criminal prosecution is not an ordinary party to a controversy, but a 'servant of the law' with a 'twofold aim . . . that guilt shall not escape or innocence suffer' ".

II

The Government seeks to defend the Court's charge to the jury on the importance of accounting principles by quoting the Court of Appeals' deprecation of the expert accounting testimony. Thus the Government, as the Court below, characterizes the expert testimony as meaning little more than that "*nothing in the financial statements themselves* negated the conclusion that an honest judgment had

been made". This argument is no more than repetition of the Court of Appeals' error. The expert testimony, by "an impressive array of leaders of the profession", was entirely different: all testified that, *on the facts of the entire case,* petitioners' certification of Continental's financial statements was not in any way inconsistent with generally accepted accounting principles (Tr. 3067, 3129, 3184, 3212, 3250, 3277, 3375, 3549). We urge that the jury should have been instructed that if they accepted that testimony, petitioners should have been acquitted.

The petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit should be granted.

March 20, 1970

Respectfully submitted,

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